IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 681

RAILROAD COMMISSION OF TEXAS ET AL,
Petitioners

VS

ROWAN & NICHOLS OIL COMPANY,
Respondent

RESPONDENT'S MEMORANDUM BRIEF ON WHETHER THE SUIT IS MOOT AND REPLY TO AMICI CURIAE BRIEFS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Without urging, or intending to be understood as urging, that this case is moot, Respondent's counsel made known to the Court that pending appeal the Railroad Commission had promulgated, and is now enforcing, a new order in the East Texas field, and that such new order has not been enforced to control

production from the lease involved in this suit. (Respondent's Brief, p. 1) Respondent's counsel considered it their duty to disclose such facts.

Following the suggestion of the Chief Justice, Respondent and Petitioners have joined in a stipulation which they believe discloses the pertinent facts in reference to the question as to whether or not the case is moot, and there is appended to the stipulation a copy of the new order.

The decisions of this Court support the proposition that because of the public importance of the questions involved in the case, a change in the order or a suspension of its enforcement would not render the case moot. The fact that the Commission has excepted the lease involved in this case from the force of the new order and is continuing to vigorously prosecute this appeal, indicates that if successful in the appeal the Commission would then apply the plan of proration involved here to control production in the field; or else such fact shows that the Commission considers the new order within the class of orders enjoined by the decree in this case. If the Commission intends to enforce this plan of proration if successful in this suit then the issues are a subject of real controversy between the parties, and the case is not moot; or if the new order is within the class of orders enjoined by the decree, the case is not moot. It would only be logical to assume that if the Commission had determined to finally abandon the method of proration now under attack, that it would not carry on in its efforts to sustain as valid that method of proration, unless it considers the new order within the class of orders enjoined by the decree. Independent of the public

importance of the issues and the future policy of the Commission, it seems certain that the new order could not possibly render the case moot if the difference between the plan of proration here involved and the plan provided by the new order, when applied to the Respondent's lease, have substantially the same effect in respect to the opportunity afforded Respondent to recover its fair share of the oil. There is a difference in the language of the two orders, and the new order increases the total of the daily field allowable; but a comparison of the effect of the new order, as shown by the stipulated facts, when applied to Respondent's lease with the effect that the plan of proration involved in this case had on Respondent's lease fails to show that the new order would substantially improve Respondent's situation in relation to the opportunity afforded Respondent to recover its fair share of the oil.

Under the plan of proration here involved Respondent was allowed to produce daily from its lease 100 barrels on the basis of the 20 barrel minimum per well; and in addition Respondent was allowed to produce daily from the lease, as its part of the 7,000 barrels of proratable oil, 11.83 barrels, or 1 barrel out of every 592 barrels of proratable oil. Under the new order Respondent would be allowed to produce daily 100 barrels on the basis of the 20 barrel minimum; and in addition thereto Respondent would be allowed to produce daily from its lease, as its part of the 176,000 barrels of proratable oil, 105 barrels, or only 1 barrel out of every 1676 barrels of proratable oil. These facts appear from the record in this case and the stipulated facts.

The method of proration involved in this case allowed all wells that could not make as much as 20 barrels per day to produce to the maximum of their capacity, and allocated to all wells capable of producing 20 barrels of oil or more per day a minimum allowable of 20 barrels per day. These allocations disposed of all but approximately 7,000 barrels of the daily field allowable of 522,500 barrels, and the 7,000 barrels so remaining was divided among some 6,325 wells having hourly potentials in excess of 865 barrels. (R., 970-971) This method of proration placed all wells having daily potentials of only 20 barrels and all wells having hourly potentials up to 865 barrels (in excess of 20,000 barrels per day) on the same basis for production. The method did not provide for adjustment of allowables on the basis of density of drilling of leases or comparative reserves of leases. Under this method of proration, a 10-acre lease with 10 wells was allowed to produce five times as much oil per day as an adjoining 10-acre lease with 2 wells, although the two leases had the same sand thickness, reserves, pressures, and position on the structure.

The stipulation accompanying the copy of the new order shows that the field allowable for producing days is fixed at approximately 690,000 barrels of oil; that each well in the field that cannot make as much as 20 barrels per day is allowed to produce to the maximum of its capacity the same as under the prior order; that each well in the field capable of producing more than 20 barrels of oil per day is granted a minimum allowable of 20 barrels per day the same as under the prior order; that these allocations dispose of all but approximately 176,000 barrels of the daily field allowable of approximately 690,000 barrels; that

such 176,000 barrels is prorated among wells by a factor (see par. (b) 3 of Rule 23, Appendix to Stipulation) that takes into account well potentials, bottomhole pressure, sand thickness and acreage. The Commission has excepted the lease involved in this case from the force of the new order, and is currently allowing Respondent to produce from that lease under the terms of the decree in this suit.

The plan involved here allowed Respondent's lease to produce daily 111.83 barrels per day (R., 977). 100 barrels of this allowable was the result of the per well minimum of 20 barrels; 11.83 barrels was Respondent's part of the 7,000 barrels of field allowable that was not distributed to the small wells and on the 20 barrel per well minimum. This 11.83 barrels allocated to Respondent's wells over and above the amount allocated to them on the 20-barrel minimum, represented .171% of the 7,000 barrels of proratable oil. Under the new order Respondent's lease would be allowed to produce approximately 205 barrels per day. (See Stipulation) 100 barrels of this would be the result of the per well minimum of 20 barrels; 105 barrels would be Respondent's part of the 176,000 barrels of field allowable that is not distributed to the small wells and on the 20-barrel per well minimum. That is to say, under the new order Respondent's lease would be allowed only .060% of the 176,000 barrels of proratable oil, as compared with .171% of the proratable oil allowed to Respondent under the plan of proration here involved. The field allowable has been increased and Respondent's total daily production would be increased, but the 20-barrel minimum would be continued in force and Respondent's lease would receive a lesser per cent of the 176,000

barrels prorated under the formula of the new order than the per cent of the 7,000 barrels received by Respondent under the prior order. Under the plan of proration here involved Respondent's lease was allowed to produce daily .0214% of the daily field allowable, while under the new order Respondent would be allowed to produce .0297% of the daily field allowable. Therefore, the new order would not substantially change Respondent's situation in regard to its opportunity to produce its fair share of the daily field allowable. The new order is cast in different words but it would leave Respondent in substantially the same situation as the plan of proration involved here in so far as according Respondent an opportunity to produce its fair share of the oil.

The vice in the method of proration here involved is the distribution of the principal part of the daily field allowable on a per well basis, ignoring the difference in recoverable reserves and drilling density of leases, and resulting in unreasonable discrimination between leases and in allowing one operator to take the oil of another. The 20-barrel per well minimum that condemns the method of proration under attack here is carried forward in the new order as a basis for distributing among wells a principal part of the daily field allowable. It is only by increasing the daily field allowable from 522,500 barrels to 690,000 barrels that the new order makes available any material quantity of oil for distribution among wells on any basis other than a per well basis. To the extent, at least, that the new order adopted the per well method of distribution, it attempts to enforce the method of proration here involved and has the same infirmity as the plan of proration involved in

this case. The fact that the Commission has excepted the lease in question from the force of the new order may indicate that the Commission construes the new order as coming within the class of orders enjoined by the decrees of the lower Courts.

It is obvious that under the new order, as the number of wells in the field is increased, or as the daily field allowable is reduced to prevent waste, or as both occur, there will be a constantly increasing amount of the daily field allowable distributed among the wells on a per well basis that does not take into account potentials, pressures, sand thickness, acreage or any other factor that measures the reserves of one lease as compared with another.

The comparison of Respondent's situation under the plan of proration here involved with what its situation would be were the new order enforced against it seems to demonstrate that Respondent's situation would be substantially the same under either plan of proration; and that the question of whether or not the case is moot may be disposed of on that basis.

In this connection it should be borne in mind that Respondent sought relief against the existing method of proration and any other that prevented its producing its fair share of the daily field allowable (R., 1-15); and that the trial Court decreed the invalidity of the existing method of proration and restrained enforcement of that method to control production of oil from Respondent's lease, and also enjoined Petitioners from enforcing "any such plan of proration or allocation of field allowable among wells as said orders have been interpreted by the Railroad Commission to require" (R., 77-78).

Respondent believes that authorities hereinafter cited and quoted from demonstrate that the suit is not moot.

United States vs Trans-Missouri Freight Association, 166 U. S. 290, 307-309, was a suit by the United States against the Freight Association, having for its purpose the securing of a judgment declaring the agreement between the members of the Association violative of the Sherman Anti-Trust Act and dissolving the Association. Judgment of the trial Court dismissing the bill was affirmed by the Circuit Court of Appeals. After the judgment was entered by the trial Court, the Association was dissolved by a vote of its members and thereafter a motion to dismiss the appeal was filed in the Supreme Court of the United States. In holding that the case was not moot, the Court, speaking through Mr. Justice Peckham, said:

> * * * "The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future.
>
> * * * "Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor

prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case."

Compare *United States of America vs Hamburg-American Co.*, 239 U. S. 466, 475, et seq.

In *Southern Pacific Terminal Co. vs Interstate Commerce Commission et al*, 219 U. S. 498, 514-516, appellant sought an injunction to restrain enforcement of an order of the Interstate Commerce Commission requiring the appellant to cease and desist, on or before a certain date, and for a period of not less than two years thereafter, from granting undue preferences and advantages to a certain shipper. After the two years had past it was contended that the order of the Commission had expired and that the case had thereby become moot and the appeal should be dismissed. In overruling this contention the Court, speaking through Mr. Justice McKenna, said:

* * * "The case at bar comes within the rule announced in United States vs Trans-Missouri Freight Assn., 166 U. S. 290, 308, and Boise City Irr. & Land Co. vs Clark (C. C. App., 9th Cir.), 131 Fed. Rep. 415.

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition,

yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

In *Southern Pacific Co. vs Interstate Commerce Commission*, 219 U. S. 433, 452, the Railway Company sought to enjoin the enforcement of an order of the Interstate Commerce Commission requiring the Company to cease from charging a certain rate. The claim was made that the suit was moot. The language used by the Court in disposing of the contention in that case is peculiarly interesting in this case because of the contention made by the Attorney General in oral argument that if the order involved in this case is valid, the Railroad Commission would attempt to charge against future production of Respondent the amount of oil produced by Respondent under the decree in this case over and above the allowable fixed by the Commission. In disposing of the question in that case the Court, speaking through Mr. Chief Justice White, said:

* * * "It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern Pacific Terminal Co. vs Interstate Commerce Commission*, this day decided, *post*, p. 498. In addition to the considerations expressed in that case it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of

> the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy."

McGrain vs Daugherty, 273 U. S. 135, 181, involved an appeal from a final order of the District Court, in *habeas corpus*, discharging Daugherty from the custody of McGrain, deputy sergeant at arms of the Senate, by whom Daugherty had been arrested, as a contumacious witness, under a warrant of attachment issued by the President of the Senate in pursuance of a Senate resolution. The point was made that after the Congress which initiated the investigation expired that the case became moot. The Court, speaking through Mr. Justice Van Devanter, overruled the contention, saying:

> * * * "So far as we are advised the select committee having this investigation in charge has neither made a final report nor has been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. The situation is measurably like that in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 514-516, * * *. Our judgment may yet be carried

into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the habeas corpus proceedings. In these circumstances we think a judgment should be rendered as was done in the case cited."

In *Leonard & Leonard vs Earle*, 279 U. S. 392, 398, this Court, speaking through Mr. Justice McReynolds, held that an action in mandamus to compel a state officer to license plaintiff's business for the ensuing year without his complying with statutory conditions which he claimed were unconstitutional did not become moot with the expiration of that year, in view of the nature of the controversy and the stipulation of the parties that it was plaintiff's purpose to continue in business.

Newport News Ship Building & Dry Dock Co. vs Schauffler, 303 U. S. 54, 58, involved a bill which sought to restrain officials of the National Labor Relations Board from holding a hearing upon a complaint issued against the ship building company. The complainant contended that an injury would result from the hearing. The Circuit Court of Appeals refused to grant an injunction staying action by the Board pending appeal. An application for a stay was made to a Justice of the Supreme Court and refused. Thereupon a hearing was held before the trial examiner of the Board and was apparently closed. In answer to the contentions that the suit was moot the Court, speaking through Mr. Justice Brandeis, said:

* * * "To the extent that relief was sought to prevent the injury resulting from a hearing the cause appears to be moot. But the cause cannot be disposed of as moot, as the

> trial examiner has not yet made his report to the Board; the Board has made no decision; and thus there is a possibility of further proceedings."

Boise City Irrigation & Land Co. vs Clark (9th Cir.), 131 Fed. 415, 418, cited with approval on the point here discussed in *Southern Pacific Terminal Co. vs Interstate Commerce Commission*, 219, U. S. 498, 515, was a suit having for its purpose the annulling of an order made by Water Commissioners fixing a maximum rate to be charged by the complainant for water delivered from its canal system to customers thereof for the irrigating season of the year 1901. In that case the Court said:

> * * * "It is contended on the part of Appellees that, as the period for which the rate in question was fixed has expired, the case has become but little, if any, more than a moot case; but the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter."

It appears to be the law that where a case challenging an administrative order involves questions that are of public importance and are continuing in their nature, a change in the order will not render the case moot. This is illustrated by the fact that this Court has held that suits to enjoin enforcement of short term orders of the Interstate Commerce Commission do not become moot upon expiration of the terms of such

orders. This ruling is based upon the principles that such orders involve public rights and that the decision may influence future rates or be the basis of further proceedings or reparation. Final review by the Supreme Court should not be continuously defeated by the successive expiration of such orders. If it were possible to so defeat the jurisdiction and final decision of this Court on the validity of administrative orders, then administrative bodies could adopt the device of limiting the terms of their orders or from time to time, in the face of litigation, making changes in their orders and thereby effectively prevent judicial review of regulatory orders.

The rule adopted by this Court in suits involving short term orders of the Interstate Commerce Commission that such suits are not rendered moot by the expiration of the terms of such orders seem peculiarly applicable in the instant case. Especially do they appear applicable in view of the Attorney General's statement in oral argument that, if the trial Court and Circuit Court judgments are reversed and the order upheld, the Commission has the right to charge against Respondent's future production the amount of oil produced under the decree in excess of the amount allowed under the Commission's regulation. Such a charge would be comparable to reparations in rate cases.

If the case were held moot and remanded with instructions to dismiss, then, apparently, the Commission would attempt to charge past production against Respondent's future allowable or make claim for penalties and thereby further litigation would be incited. If the case is held to be moot then, in view

of this position taken by the Attorney General, the last judgment, being that of the Circuit Court of Appeals, should be allowed to stand.

The Amici Curiae briefs filed a day or two before submission on oral argument make substantially the same approach to the case as was made in Petitioners' brief. Respondent ask leave to reply.

Amici Curiae, like Petitioners, argue this suit on the basis of excerpts from the testimony without directly attacking the sufficiency of the evidence to support the findings of the trial Court. It was in connection with this approach by Petitioners that Respondent directed attention to the fact that Petitioners did not except to or ask modification of the findings, and Petitioners' replied by citing Rule 52 (a) of the Rules of Civil Procedure. One of the Amici Curiae cited the rule, but neither Petitioners nor Amici Curiae quoted the provisions of the Rule to the effect that the findings of the trial Court shall not be set aside unless clearly erroneous and that due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses. Petitioners did claim in their reply brief the right to challenge the sufficiency of the evidence to support the findings because they have specified error on the holding of the lower courts to the effect that the proration orders of the Commission are arbitrary and unreasonable and that Respondent showed itself to be injured by the method of proration involved. These specifications are not of that specific character required by the Rules of this Court. (See Rule 9; par. 2(e) of Rule 27; par. 2 of Rule 38) The specifications of error relied upon would be as appropriate, and even

more so, to support an argument that the findings are not sufficient to support the judgment. It is our understanding that on certiorari this Court will only consider the errors specified in the Petition, except errors of the most apparent nature. (*Zellerbach Paper Company vs Helvering*, 293 U. S. 172, 182.)

The argument not only overlooks the fact that Petitioners failed to specify as error that the evidence does not support the findings, but also overlooks the fact that the findings of the trial Court were not disturbed by the Circuit Court of Appeals, and that it is the rule of this Court that findings will not be disturbed that have been concurred in by two lower Courts in the absence of a clear showing that they are erroneous. (*Texas and New Orleans Railroad Company et al vs Brotherhood of Railway & Steamship Clerks, et al.*, 281 U. S. 548, 558; *United States vs Commercial Credit Co., Inc.*, 286 U. S. 63, 67)

Arguments of the Amici Curiae and of Petitioners seem to proceed upon the theory that this Court will examine the testimony and if there is found therein substantial basis to support the action of the administrative agency, that the action will be upheld. We do not think this rule applies. This suit originated as a bill in equity to enjoin enforcement of a method of proration on the ground that as enforced and applied to control production of oil from Respondent's lease the method was discriminatory and operated to confiscate Respondent's property in violation of the Fourteenth Amendment to the Constitution of the United States. In such a case a judicial review of the law and facts is guaranteed by the due process clause, contemplating that the Courts will make an independent determina-

tion of the facts and draw independent conclusions and inferences therefrom. (*Saint Joseph Stock Yards Co. vs. United States*, 298 U. S. 38, 51; *Ohio Valley Water Co. vs Benavon Borough*, 253 U. S. 287, 289; *Bluefield Water Works Co. vs Public Service Commission*, 262 U. S. 679; *State vs Wichita Gas Co.*, 290 U. S. 561, 569) and, on certiorari to a United States Circuit Court of Appeals in such a case, this Court, as in *Standard Oil Co. vs Maryville*, 279 U. S. 582, 584, will not go beyond findings to which the petitioners have not offered serious challenge. The findings of the trial Court show that the method of proration involved is confiscatory, and so arbitrary as to be without rational basis. Even were the Court to look beyond the findings, to the testimony, it will appear therefrom that the findings are supported by evidence which demonstrates virtually beyond dispute the unreasonableness and injustice of the method of proration applied and enforced to control production from Respondent's lease.

On oral argument a question was asked as to whether or not the proceedings before the Commission were a part of the record. This question was answered in the affirmative by counsel for Petitioners and it now appears that such answer may be misleading. Apparently the Court hand in mind one Commission proceeding, and counsel for Petitioners another. The Court apparently had in mind the proceedings preliminary to the Commission's adopting the method of proration here involved. Counsel for Petitioners, being familiar with the record, must have had in mind the proceedings before the Commission in connection with Respondent's petition for adjustment of allowables. A. H. Rowan, a witness for Respondent, testified that applications had been made

to the Commission for adjustments in well allowables. (R., 127-129). In connection with this testimony, Respondent offered in evidence (R., 129) the proceedings before the Commission on the application for adjustment of allowables (R., 718-858). The purpose of this testimony was to show that Respondent had protested the method of proration involved and had exhausted its administrative remedies. This was the only record of proceedings before the Commission that was offered in evidence on the trial of this case.

The briefs question the provision of the trial Court's decree that "Respondents (Petitioners here), their agents, servants, employees and representatives, are restrained from interfering with Complainant (Respondent here) in daily producing from the wells on its said lease * * * the amount of oil which bears to the daily field allowable fixed by the Railroad Commission the ratio which 220 barrels bears to 522,000 barrels * * *." (R., 78) This provision of the decree was amended by the Circuit Court of Appeals as follows:

> * * * "In order to remove any doubt as to the temporary character of the ratio fixed by the District Court, the judgment will be amended to read 'without prejudice to the right of the Commission to enter a reasonable proration order and to fairly enforce it.'" (Tr., 110)

In asking equitable relief, Respondent did not pray for an injunction that would permit it to produce oil from its wells without restriction, but asked that the Commission be restrained from interfering with Respondent in producing its fair share of the oil. (R.,

14-15) The trial Court pointed out this fact (R., 75), and limited the effect of the injunction by the questioned provision of the decree. In this connection see *City of Toledo vs Toledo Ry. & Light Co.* (Sixth Circuit) 259 Fed. 450, 458, where the Court said:

> "It is also urged that the making of rates for public service is not a judicial function, and that the court has no power to make rates. It is true enough that the direct power of the courts on this subject is negative and not affirmative. Reagan vs Farmers' Co., 154 U. S. 362, 400, 14 Sup. Ct. 1047, 38 L. Ed. 1014. To say that a specified rate is invalid because confiscatory is always to say that any lower rate will also be invalid, and sometimes the facts will be such that, in order to decide whether the rate in question is unlawful, the court must first determine with some accuracy what would be the minimum reasonable return. It is likewise plain that, when an injunction is asked to restrain the enforcement of an unreasonable rate, the court may make its granting conditional upon the doing of equity by plaintiff, and thus may require the plaintiff to consent to charge no more than what seems to the court to be reasonable—just as, in tax injunction cases, the plaintiff is often required to pay what the court thinks a fair tax before it will give relief against the excessive part."

See also *Public Service Ry. Co. vs Board of Public Utility Commissioners*, 276 Fed. 979, 990, where the Court said:

> "As the court is not presently concerned with the lawfulness of the 10 cent rate no temporary injunction affecting that rate will

be awarded. As the court has found against the lawfulness of the rate of 7 cents plus 2 cents it is clear that the injunction must restrain the enforcement of that rate. But if the court were to do nothing more, the effect of such an injunction would be to annul the rate of 7 cents plus 2 cents, thus re-establishing the previous rate of 7 cents plus 1 cent or leaving established no rate at all. This would be doing injury rather than equity to the complaining party. Anticipating that the court might name a new rate as a condition of an injunction against the old one, counsel for the Board have quite pertinently called the court's attention to the fact that it is not a rate-making body and have made the point that if the court name a rate as a condition for granting an injunction, it would, in effect, fix a new rate and would thereby exceed its function. *That it would exceed its function as a rate-making body is very true, because, not being such a body, it has no such function. But that in so doing it would exceed its power as a court of equity is not true.* Injunction is one of the equitable remedies over which the court has jurisdiction. The remedy of injunction may be granted in the terms of the prayer or it may be granted only upon condition that the party seeking equity shall do equity, as in this instance, that the Company shall consent to charge a fare no greater than what the court deems necessary to avoid confiscation. If the naming of a condition is in effect the fixing of a rate, the sanction for the court's act is in the injunction and in the circumstances that make injunction imperative. This rule is ancient and of wide application. Walden vs Bodley, 14 Pet. 156, 164, 10 L. Ed. 398; State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Cummings vs National Bank, 101 U. S. 153,

25 L. Ed. 903; People's National Bank vs Marye, 191 U. S. 272, 282-288, 24 Sup. Ct. 68, 48 L. Ed. 180; Amarillo vs Southwestern T. & T. Co., 253 Fed. 638, 165 C. C. A. 264; Toledo vs Toledo R. & L. Co., 259 Fed. 450, 458, 170 C. C. A. 426; Consolidated Gas Co. vs Newton (D. C.), 267 Fed. 231, 272, 274."

The amendment of the judgment by the Circuit Court of Appeals ought to set at rest the questions raised concerning that part of the decree so brought in question. The term "to remove any doubt as to the temporary character of the ratio fixed," as used by the Circuit Court of Appeals in the amendment, appears to mean that the ratio is to be effective pending this appeal or the Commission's entering a proration order and enforcing it in a manner that does not contravene the judgment of the trial Court as amended and affirmed by the Circuit Court of Appeals.

However, the decree could be construed as a finding by the trial Court that Respondent is under the laws of Texas entitled to produce according to the ratio stated in the decree, and as so construed the judgment can be sustained. The trial Court's first problem was to determine what Respondent's property rights were and in determining whether Respondent was or was not allowed an equal opportunity with others for developing and realizing for its leasehold, it became necessary for the trial Court to determine what would be required, within a reasonable degree, to give Respondent such an equal opportunity. If the trial Court determined that on a field allowable of 522,000 barrels Respondent, in order to have an equal opportunity with others, would have to produce approximately 220 barrels of oil daily; that was a method

of determining Respondent's rights and that the existing order did deny to Respondent its rights and resulted in depriving Respondent of its property. If the trial Court so determined, it was proper that the trial Court enjoin the existing method of proration and it was legitimate for the trial Court to enter a decree that stated Respondent's rights and protected them. It was also legitimate that the trial Court enjoin any other order, as long as existing conditions continued, that would restrain Respondent from producing in accordance with its right as found by the trial Court. This position is sustained by well considered cases, and does not involve the Courts' substituting their judgment for that of an administrative agency or the Courts' attempting to exercise the functions of an administrative agency. Cases hereafter cited and quoted from, support this proposition.

In *City of Toledo vs Toledo Ry. & Light Co.*, 259 Fed. 450, 458, the Court said:

> * * * "To say that a specified rate is invalid because confiscatory is always to say that any lower rate will also be invalid, and sometimes the facts will be such that, in order to decide whether the rate in question is unlawful, the court must first determine with some accuracy what would be the minimum reasonable return. * * * In any of these instances, there is an indirect fixing or determination by the court, but each of these indirect results is fully within the judicial power."

In a rate suit final adjudication on value of property and the reasonableness of the rate is, pending some change in conditions, res judicata between the parties on those questions. In this suit it was necessary in

determining the reasonableness of the attempted regulation, that the Court find the quality, extent and nature of Appellee's property right and the extent to which the regulatory agency might, under the facts, lawfully regulate or restrict enjoyment of this property right. Determination of these matters is necessary to a determination of the ultimate issue of reasonableness or legality of the regulation in question. Having determined these matters, is a court of equity denied the power to protect the injured party by entering a decree that expresses these determinations? Is the successful litigant to be protected by a decree that declares his rights and gives the regulatory body to understand what those rights are, or is he to see one regulation invalidated and, for the want of a judicial declaration of his rights, hoisted on the lance of another invalid regulation adopted by the regulatory body in its trial and error method of attempting to adopt valid regulations? Such a rule would be productive of litigation and extremely oppressive on a property owner, particularly when dealing with an incompetent or contumacious regulatory agency. There is not anything so sacrosanct about an administrative body exercising legislative functions that a Court may not appropriately, in holding a given rate confiscatory, also enjoin any rate of less than a stated amount and so give the property owner protection of full equitable relief. The Court should not be confined merely to finding the right and that the right is being violated; but the Court should be allowed to go further and say on the testimony how far regulation may be imposed without violating the right. To say that a Court may determine that a given rate is confiscatory, but may not at the same time say that on the evidence a rate yielding less

than a certain return would also be confiscatory, is to deny to the parties, including the regulatory body, the benefit of a complete adjudication of the questions presented, as in this suit for the Court to deny to itself the power to define the extent to which Respondent's property may be regulated under the evidence and conditions shown to exist is to deny itself the power to completely adjudicate the questions presented. So, in a suit like this, when on the evidence the Court is able to determine the rights of the parties, it would not be an exercise of power in excess of the power properly reposed in the judiciary for the Court to define the limits of valid regulation by saying that under conditions existing at the time of the trial any order that reduced production substantially below a given amount would be destructive of property rights, and so give the Commission a practical guide in attempting to perform its duties, rather than return the question to the Commission with no better standard of guidance than the general principle that a regulatory order must be reasonable.

In *Ottinger vs Consolidated Gas Co.*, 272 U. S. 576, the Gas Company attacked a rate as being confiscatory. The lower Court enjoined the rate because confiscatory and because its enforcement would impair the Gas Company's contract with the State contrary to Article I, section 10, of the Constitution of the United States. The conclusion of the Master, confirmed by the lower Court, was that the prescribed rate of $1.00 per thousand feet would not yield a return of 6%, and was, therefore confiscatory. The Supreme Court modified the decree of the District Court by excluding therefrom those parts which declared the rate invalid for any reason except enforcement would

result in confiscation, and, as so modified, affirmed the decree of the trial Court. The result of that case was, in effect, to say that in prescribing rates for the Gas Company, a rate must be fixed that will yield a return of not less than 6% on the value of the Gas Company's property. And, in this suit the judgment of the trial Court could be construed as decreeing that a Commission order which under existing circumstances restricts Respondent to substantially less than a certain amount of production would be confiscatory, and as so construed could be sustained as an exercise of judicial power within constitutional limitations.

Duluth St. Ry. Co. vs Railroad and Warehouse Commission, 4 Fed. (2d) 543, 550, was a suit for injunction by the Railroad Company against the Commission to enjoin enforcement of an order fixing a rate of fare in the city of Duluth. The case came on for hearing upon exceptions to the report of a Special Master. The Court modified certain findings of the Master in that case and after so modifying them overruled the exceptions and stated:

> "While the foregoing modifications in the findings of fact of the master have seemed to me to be necessary, yet they do not, in my judgment, necessitate any change in the final conclusion reached by the master, but rather strengthen and confirm that conclusion, viz., that the enforcement of the order of the Commission of July 13, 1923, would deprive plaintiff of its property without just compensation; and that to earn a sufficient return to avoid confiscation, plaintiff must be permitted to charge and collect 6 cents for each passenger carried by it in the city of Duluth."

That case was before the Supreme Court of the United States under the style of *Railroad and Warehouse Commission vs Duluth St. Ry. Co.*, 273 U. S. 625, and although the part of the trial Court's opinion quoted above is not referred to in the opinion of the Supreme Court, the trial Court's decree was affirmed.

Respondent's right to protection against a per well method of proration which allows adjoining tracts of comparable reserves to produce more or less oil in comparison one with the other, depending upon density of drilling, has been recognized by the Courts of Texas and by courts of federal jurisdiction. The right was recognized in *Brown vs Humble Oil & Refining Co.*, 126 Tex. 26, 309, 312; 83 S. W. (2d) 935, 942, 944, where the Court said that it was proper for the Commission to adjust allowable so as to give the owner of the smaller tract only his just proportion of the oil and gas. In *Magnolia vs Blankenship*, (5th Cir.), 85 Fed. (2d) 553, 555; writ refused, 299 U. S. 608, the Court, speaking through Judge Sibley, pointed out that the proper remedy for an owner of land adjacent to a small or densely drilled area was to seek before the Commission an adjustment of allowables.

In *Peoples' Petroleum Producers, Inc., vs Smith*, 1 Fed. Sup. 361, 365, the Court, speaking through Judge Hutcheson, condemned a per well method of proration in the East Texas field in the following language:

> * * * "in direct contravention of the statute, instead of justly and equitably distributing the reduction ordered, it has, through its per well requirement, so arbitrarily, unjustly, and in a confiscatory way distributed it, as that it

will inevitably take the oil of plaintiffs, situated as they are most favorably on the structure, to give it to others not so favorably situated."

In conclusion, Respondent submits that its pleadings having attacked the proration order of August 29, 1939, and any extensions and renewals continuing in effect the confiscatory plan of proration complained of, and the Court having fully tried the issue and enjoined said order and any subsequent order continuing in effect such plan of proration, the issuance of the new order, changed in form but not as to substance, still denying to Respondent the present use and enjoyment of its property, still denying to it the right to equal opportunity with other operators to produce its fair share of the daily allowable so that it can recover the recoverable oil in place under its lease, or the equivalent thereof, just as effectively as the first order did, does not render this case moot.

Petitioners and Amici Curiae fail to point out out a single issue or finding and then argue a lack of evidence to support it. Their strategy has been to single out excerpts from the testimony alone, place their own interpretation thereon, and ignore in toto practically every finding of the Court to the contrary. The lack of reference by Petitioners and Amici Curiae to the findings of fact are most conspicuous in this case. To remove any doubt that may arise in the minds of the Court, Respondent in its brief made reference to evidence supporting every finding of importance. However, the admission in the pleadings of Petitioners that the Commission does not consider in this particular field the reserves under

leases or density of drilling (R., 54), is sufficient to strike down the order, affecting Respondent, adversely, as it does. (R., 987)

Respondent has approximately as much oil in place as ever, but not nearly as much **recoverable** oil, due to the slow but inevitable approach of the water. There was testimony that under the present plan of proration the water drive is flushing the oil from under Respondent's lease and causing the oil to move up-structure to the East, and that water will take Respondent's lease before Respondent can under the present plan of proration produce an amount of oil substantially equivalent to the reserves of its lease. The water drive that is forcing oil under Respondent's lease is also flushing oil from Respondent's lease up-structure to the East. The movement of oil to the East is taking place faster than Respondent is allowed to produce under the present plan of proration, with the result that Respondent will be prevented from recovering an amount of oil substantially equivalent to the oil originally in place under the lease. The effect of the water driving oil to the East causes the difference between oil in place and recoverable oil. The trial Court found that it is rank speculation to say that Respondent will ever recover an amount of oil equivalent to that originally in place or now in place under Respondent's lease. The trial Court further found that Respondent has produced some 200,000 barrels less of oil than it would have produced had Respondent been allowed to produce in relation to its reserves. Had not the trial Court granted it some effective relief, Respondent's losses would have mounted higher while the Commission promulgated monthly orders. The Court could have granted an unlimited injunction, but in

order to do equity to Respondent and all other operators, under its unquestioned equity powers, it limited its injunction pending appeal or the issuance of a valid order. The amount of oil fixed in the trial Court's decree is immaterial. The Court could have fixed 500 instead of 220 barrels, and the Petitioners could not have complained, because such limiting of the injunction redounded to their benefit.

Respondent therefore respectfully submits that the case is not moot, and urges that the judgment of the Circuit Court of Appeals for the Fifth Circuit be in all things affirmed.

Respectfully submitted,

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ACKNOWLEDGEMENT OF SERVICE

Service of the foregoing memorandum brief for Respondents is acknowledged, this the ..... day of May, 1940.

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Attorney for Petitioners.